

Public Prosecutor v Ishak bin Ahmad

A

HIGH COURT (TAIPING) — CRIMINAL SUIT NO 45A-07 OF 2011
TEO SAY ENG JC
2 SEPTEMBER 2012

B

Criminal Law — Dangerous drugs — Trafficking — Case relied heavily on evidence of agent provocateurs — Whether prosecution had established prima facie against accused — Whether there was break in chain of custody of drugs seized — Whether defence of accused could be accepted — Whether defence created any reasonable doubt in prosecution case — Dangerous Drugs Act 1952

C

Evidence — Witness — Discrepancy in evidence — Discrepancies of prosecution witnesses — Whether discrepancies properly considered by court — Whether discrepancies affected credibility of witnesses

D

Acting on information received, the narcotics division at Perak conceived of an operation to lure one Ishak (the accused) to sell drugs to two police officers ('SP6 and SP8'), who were instructed by the head of the police raiding team to act as agent provocateurs. With the assistance of an informant, a meeting was then set up between SP6 and SP8 and the accused. At this meeting, which took place in a road side restaurant, the accused told SP6 that he could supply 2–3kg of ganja and both the accused and SP6 exchanged telephone numbers to discuss further details. Thereafter, the accused contacted SP6 and agreed to sell him 1kg of ganja at the price of RM2,600 per kg. It was also agreed between SP6 and the accused that the latter would deliver the drugs to SP6 at an R & R outlet along the Kupang Gerik Highway at about 9.30pm on 20 October 2010. As agreed SP6 and SP8 had arrived at the agreed venue to wait for the accused, while the police arresting team lay in wait for the signal from SP6. The accused was then seen arriving in his motorcycle and making his way to the table where SP6 and SP8 were seated. When questioned by SP6 as to where the drugs were, the accused had replied that they were in his motorcycle. When SP6 found the slab of compressed dried material placed in a plastic bag in the carrier of the accused's motorcycle he gave the signal for the police party to move in. The drugs seized were analysed by a chemist to be 881.57g of cannabis. The appellant was charged for trafficking in 881g of cannabis pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution's case, which relied heavily on the evidence of SP6 and SP8, was that there was a negotiated sale of 881g of cannabis by actual delivery of the same by the accused. At the close of the prosecution's case the trial judge found that a prima facie case had been made out against the accused and called for his defence. The

E

F

G

H

I

- A main ground for the defence was that the prosecution's version of the negotiated sale as recounted by SP6 and SP8 was so full of contradictions that it destroyed the credibility of both witnesses. The accused elected to give an unsworn statement from the dock. In his statement the accused claimed that he was not involved in the trafficking of 1kg of ganja as alleged by the prosecution
- B but that he had agreed to help the police to nab one Nagan, who had agreed to supply 1kg of ganja to SP6 at the price of RM2,600. The accused further claimed that when Nagan managed to abscond on the night in question, the police had arrested him and charged him with the drug trafficking offence. SP6 and SP8, both categorically denied the alleged defence and confirmed that the
- C accused was the person who promised to supply 1kg of ganja at the price of RM2,600.

Held, finding the accused guilty as charged and sentencing him to death:

- D (1) After careful consideration of the evidence adduced by SP6, SP8 and the head of the police raiding team, it was found that the alleged discrepancies raised by the defence at the close of the prosecution case were not sufficient to destroy the credibility of these witnesses. The discrepancies were minor and were to be expected of witnesses giving
- E their recollections of a series of events that took place some time ago. It was also a recognized point of law that two or more persons witnessing the same incident were likely to give varying yet truthful accounts according to their perception. In the present case the discrepancies of SP6, SP8 and their head were minor. At the same time they were
- F consistent in establishing that SP6 had met and negotiated the sale and delivery of the cannabis, which were the subject matter of this charge, with the accused (see paras 12–13).
- G (2) The defence attempted to be put forward by the accused at the end of the prosecution case was highly unbelievable and had failed to cast any reasonable doubt in the prosecution case. The entire defence had been categorically denied by SP6 and SP8, whose testimonies were consistent and not shaken by the defence. The appellant's claim that the police had charged him when they failed to arrest Nagan was highly unreasonable. The police would not ruin their reputation by charging someone who
- H promised to help them to nab the drug trafficker, when the drug trafficker had absconded (see para 15).
- I (3) The defence submission on the break of the chain of evidence of the drugs seized was totally without merit. There was no break in the chain of evidence of the drugs seized from the day the drugs were seized by SP7 until the same were tendered in court. As there was no doubt as to the identity of the drugs seized, there was no need for the prosecution to call every person who handled the drugs to testify in court (see para 26–27).
- (4) In the light of the totality of the evidence, the accused's unsworn

statement from the dock was unbelievable and unacceptable because it was a bare denial that completely contradicted the version given by the two agent provocateurs. SP6 and SP8 were certain that the accused was the person who promised to supply and who had supplied the 1kg of ganja at the price of RM2,600 on the day in question. There was no reason not to believe their evidence, when they had testified upon oath and their evidence had not been shaken despite being subject to rigorous cross-examination. On the other hand, the unsworn statement by the accused, which had not been tested in cross-examination, failed to create any reasonable doubt in the prosecution case (see para 43).

- (5) It was not safe to rely on the evidence of the defence witness, particularly since he was not sure about the material fact as to who had arrived first at the R&R outlet. In any case the evidence given by this witness would not shake the testimonies of SP6 and SP8 in respect of the negotiation of the sale and purchase of drugs between SP6 and the accused and the delivery of the impugned drug by the accused at the appointed time and place. Thus, this evidence also failed to create any reasonable doubt in the prosecution case (see para 43).

[Bahasa Malaysia summary]

Bertindak atas maklumat yang diterima, bahagian narkotik di Perak membuat satu operasi untuk mengumpun Ishak (tertuduh) untuk menjual dadah kepada dua orang pegawai polis ('SP6 dan SP8'), yang diarahkan oleh ketua polis pasukan serbuan untuk bertindak sebagai ejen-ejen perangkap. Dengan bantuan seorang pemberi maklumat, satu pertemuan dirancang antara SP6 dan SP8 dan tertuduh. Pada pertemuan ini, yang mengambil tempat di restoran tepi jalan, tertuduh memberitahu SP6 bahawa dia boleh membekalkan 2–3kg ganja dan tertuduh dan SP6 bertukar-tukar nombor telefon untuk membincangkan butiran-butiran lanjut. Selepas itu, tertuduh menghubungi SP6 dan bersetuju untuk menjual kepadanya 1kg ganja pada harga RM2,600 setiap kg. SP6 dan tertuduh juga bersetuju bahawa tertuduh akan menghantar dadah tersebut kepada SP6 di sebuah rangkaian R & R sepanjang Lebuhraya Raya Kupang Gerik sekitar 9.30pm pada 20 Oktober 2010. Seperti yang dijanjikan, SP6 dan SP8 tiba di tempat yang dipersetujui untuk menunggu tertuduh, sementara pasukan tangkapan polis menunggu isyarat daripada SP6. Tertuduh kemudiannya dilihat tiba dengan motorsikalnya dan berjalan menuju ke meja di mana SP6 dan SP8 berada. Apabila SP6 menanyakan di mana dadah tersebut, tertuduh menjawab bahawa dadah tersebut ada di motorsikalnya. Apabila SP6 menemui satu kepingan bahan kering yang dimampatkan dalam satu beg plastik di dalam raga motorsikal tertuduh, dia memberikan isyarat kepada pasukan polis untuk bergerak. Dadah dirampas yang dianalisa oleh ahli kimia merupakan 881.57g ganja. Tertuduh dipertuduh mengedar 881g ganja menurut s 39B(1)(a) Akta Dadah Berbahaya 1952. Kes pendakwaan, yang bergantung sepenuhnya ke atas

- A keterangan SP6 dan SP8, ialah terdapat jualan rundingan 881g ganja dan penghantaran sebenar dadah tersebut dibuat oleh tertuduh. Pada penutup kes pendakwaan, hakim perbicaraan mendapati bahawa satu kes prima facie telah dibuktikan terhadap tertuduh dan memanggilnya untuk membela diri. Alasan utama untuk pembelaan ialah versi pendakwaan mengenai jualan rundingan
- B seperti yang diceritakan oleh SP6 dan SP8 penuh dengan percanggahan dan ini memusnahkan kredibiliti kedua-dua saksi. Tertuduh memilih untuk memberi pernyataan tidak bersumpah dari kandang. Dalam pernyataannya, tertuduh mendakwa bahawa dia tidak terlibat dalam mengedar 1kg ganja seperti yang didakwa oleh pihak pendakwaan tetapi dia bersetuju untuk menolong polis
- C menahan Nagan, yang bersetuju membekalkan 1kg ganja kepada SP6 pada harga RM2,600. Tertuduh seterusnya mendakwa bahawa apabila Nagan dapat meloloskan diri pada malam kejadian, polis menangkap dan menuduhnya dengan kesalahan mengedar dadah. SP6 dan SP8, masing-masing menafikan pembelaan seperti yang didakwa dan mengesahkan bahawa tertuduh
- D merupakan orang yang berjanji untuk membekalkan 1kg ganja pada harga RM2,600.

Diputuskan, mendapati tertuduh bersalah seperti dipertuduh dan menjatuhkan hukuman mati ke atasnya:

- E (1) Selepas pertimbangan teliti keterangan yang dikemukakan oleh SP6, SP8 dan ketua polis pasukan serbuan, didapati bahawa percanggahan seperti didakwa yang dikemukakan oleh pihak pembelaan pada penutup kes pendakwaan tidak mencukupi untuk memusnahkan kredibiliti
- F saksi-saksi tersebut. Percanggahan-percanggahan tersebut hanyalah kecil dan boleh diagak daripada saksi-saksi yang memberikan kenyataan mengenai satu siri peristiwa yang berlaku pada masa lalu. Ia juga merupakan satu perkara undang-undang yang diiktiraf bahawa dua atau lebih orang yang menyaksikan insiden yang sama berkemungkinan
- G memberikan kenyataan berbeza tetapi benar menurut persepsi mereka. Dalam kes ini percanggahan SP6, SP8 dan ketua mereka adalah kecil. Pada masa yang sama, mereka konsisten dalam membuktikan bahawa SP6 telah bertemu dan merundingkan jualan dan penghantaran ganja, yang merupakan perkara subjek pertuduhan ini dengan tertuduh (lihat perenggan 12–13).
- H (2) Pembelaan yang cuba dikemukakan oleh tertuduh pada penutup kes pendakwaan adalah sangat-sangat tidak boleh dipercayai dan gagal untuk menimbulkan sebarang keraguan munasabah dalam kes pendakwaan. Keseluruhan pembelaan telah dinafikan secara kukuh oleh SP6 dan SP8,
- I yang mana keterangan-keterangan adalah konsisten dan tidak digoyahkan oleh pembelaan. Dakwaan perayu bahawa polis telah mempertuduhnya apabila mereka gagal untuk menangkap Nagan adalah sangat tidak munasabah. Polis tidak akan menghancurkan reputasi mereka dengan menuduh seseorang yang berjanji untuk menolong

- mereka menangkap pengedar dadah, apabila pengedar dadah tersebut telah melarikan diri (lihat perenggan 15). A
- (3) Hujahan pembelaan ke atas rantaian keterangan mengenai dadah dirampas telah terputus adalah sama sekali tanpa merit. Rantaian keterangan mengenai dadah dirampas tidak terputus daripada hari dadah dirampas oleh SP7 sehinggalah dadah tersebut dikemukakan di mahkamah. Memandangkan tidak terdapat keraguan terhadap identiti dadah dirampas, tiada sebab untuk pihak pendakwaan memanggil setiap orang yang mengendalikan dadah tersebut untuk memberi keterangan di mahkamah (lihat perenggan 26–27). B
- (4) Dalam menilai keterangan secara keseluruhan, pernyataan tidak bersumpah tertuduh daripada kandang tidak boleh dipercayai dan diterima kerana ia merupakan penafian semata-mata yang bercanggah sama sekali dengan versi yang diberikan oleh dua orang ejen-ejen perangkap. SP6 dan SP8 yakin bahawa tertuduh merupakan orang yang berjanji untuk membekalkan dan telah membekalkan 1kg ganja pada harga RM2,600 pada hari tersebut. Tiada alasan untuk tidak mempercayai keterangan mereka, apabila mereka memberi keterangan secara bersumpah dan keterangan mereka tidak digoyahkan walaupun selepas pemeriksaan balas yang ketat. Sebaliknya, pernyataan tidak bersumpah oleh tertuduh tidak diuji dalam pemeriksaan balas, gagal untuk menimbulkan sebarang keraguan munasabah dalam kes pendakwaan (lihat perenggan 43). C
- (5) Adalah tidak selamat untuk bergantung ke atas keterangan saksi pembelaan, terutamanya apabila dia tidak pasti mengenai fakta material berhubung siapa yang tiba terlebih dahulu di rangkaian R&R. Dalam mana-mana kes, keterangan yang diberikan oleh saksi sebegini tidak menggoyahkan keterangan SP6 dan SP8 berhubung rundingan jualan dan belian dadah di antara SP6 dan tertuduh dan penghantaran dadah berkenaan pada masa dan tempat yang ditetapkan. Oleh itu, keterangan ini gagal untuk menimbulkan sebarang keraguan munasabah dalam kes pendakwaan (lihat perenggan 43). D
- E
- F
- G

Notes

For cases on discrepancy in evidence, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3099–3106. H

For cases on trafficking, see 7(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 323, FC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, CA (refd) I

- A *PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 (refd)
PP v Lim Ah Bek [1989] 2 CLJ 1090, HC (refd)
Thien Teck Soon v PP [2011] 3 MLJ 438; [2011] 3 CLJ 632, CA (refd)
Timhar Jimdani Ong & Anor v PP [2010] 1 MLJ 775; [2010] 3 CLJ 938, CA (refd)
- B *Wan Marzuki bin Wan Abdullah v PP* [2008] MLJU 285; [2008] 4 CLJ 631, CA (refd)

Legislation referred to

Criminal Procedure Code s 180(1)

- C Dangerous Drugs Act 1952 ss 2, 39B(1)(a), (2), 40A

Nazratul Natrah bt Mohd Yusoff (Deputy Public Prosecutor, Attorney General's Chamber) for the prosecution.
Charan Singh (Nurul & Charan) for the accused.

- D **Teo Say Eng JC:**

BACKGROUND OF THE CASE

- E [1] The accused was charged for trafficking in a dangerous drug, to wit, 881 g of cannabis. The charge against the accused reads as follows: *Bahawa kamu pada 20 Oktober 2010, jam lebih kurang 9.00 malam di hadapan gerai R & R Bintang Hijau, KM 25 Jalan Gerik-Kupang, di dalam Daerah Gerik, di dalam Negeri Perak, mengedar dadah berbahaya iaitu 881 gram Cannabis, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a)*
- F *Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.*

- G [2] The prosecution had summoned nine witnesses to prove its case against the accused:

- (a) SP1 Ismail bin Mat Ali
— registered owner of motorcycle JGW 5417 SP2;
- H (b) Corporal Khalil bin Hassan
— photographer;
- (c) SP3 Sergeant Mazlan bin Ismail
— *penjaga setor barang kes*;
- I (d) SP4 Nurul Fadlina bt Harun
— chemist
- (e) SP5 Sergeant Md Mohayuddin bin Shuib
— *penjaga setor barang kes*
- (f) SP6 Detective S Busra bin Abd Kadir

- agent provocateur; A
- (g) SP7 ASP Mohd Fikri bin Hashim
— head of raiding team;
- (h) SP8 Lance Corporal Jafri @ Sany bin Othman B
— agent provocateur; and
- (i) SP9 Insp Ilham Ruqaiyah bt hamid
— investigating officer. C

THE PROSECUTION' CASE

[3] The prosecution relied on two main witnesses, that is, SP6 and SP8 who were the agent provocateurs to prove the offence of trafficking in dangerous drugs, to wit 881g of cannabis by delivery. D

Chronology of events

- (a) 14 October 2010 at about 2pm E
On 14 October 2010 about 2pm, SP6 received information from one Detective Sergeant Gan from the Narcotics Division Gerik that a male Malay by the name of Ishak was trafficking in a dangerous drug, to wit cannabis in Kampong Kupang, Baling Kedah. Detective Sergeant Gan also told SP6 that he could introduce the 'sumber' to any police agent provocateur if instructed to do so. F
- (b) 15 October 2010 about 9am G
On 15 October 2010 at about 9am SP6 conveyed the information to ASP Mohd Fikri (SP7), the Operation Officer, Jabatan Siasatan Jenayah Narkotik (JSJN) IPK Perak. SP7 instructed SP6 and SP8 to act as agent provocateurs. SP7 also instructed SP6 to contact Detective Sergeant Gan to introduce SP6 and SP8 to the 'sumber'.
- (c) 15 October 2010 H
On 15 October 2010 at about 6pm Detective Sergeant Gan introduced SP6 and SP8 to the 'sumber' at Gerik Narcotics Division. During the meeting the 'sumber' told them about some activities carried out by the target. However the 'sumber' said he could introduce SP6 and SP8 to the 'target'.
SP6 then instructed the 'sumber' to cook up a story and told the 'target' I
that he had a friend from Sitiawan who wished to meet the 'target' to discuss about the supply of cannabis.
The 'sumber' subsequently phoned the 'target' and he informed SP6 that the 'target' agreed to meet SP6 and SP8 on the night in question in his

- A *Kampung* in Baling Kedah. The 'sumber' also told SP6 that the 'target' requested SP6 to phone him when they reached Kampung Kupang, Baling, Kedah.
- B At 7.45pm, SP6, SP8 and the 'sumber' left the Narcotics Division Gerik for Kampung Kupang, Baling in a Gen.2 WMK 6867 driven by Jafri ('SP8').
- C At 8.30pm they reached Kampung Kupang and stopped at a restaurant selling Siamese food (hereinafter to be called Siamese restaurant) on the left side of Jalan Besar Kupang, Baling. While they were in the restaurant, SP6, instructed the 'sumber' to phone the 'target'. The 'sumber' then phoned the 'target' informing him that they were at the restaurant. About five minutes later, a motorcycle Yamaha 125cc with the registration No JGW 5417 ridden by a male Malay arrived at the Siamese restaurant.
- D After parking his motorcycle, the male Malay came to the table where SP6, SP8 and the 'sumber' were. The 'sumber' was seen shaking hand with the male Malay, the 'sumber' then introduced the male Malay to SP6 and SP8. The male Malay introduced himself as 'Ishak' whereas SP6 and SP8 introduced themselves as 'Abang Man' and 'Ja' respectively.
- E Discussion about the supply of drugs
- F SP6 discussed with Ishak about the supply of ganja and Ishak said he could supply 2–3kg of ganja in 2–3 days time but he would let him know the price later. They then exchanged their phone numbers. Ishak promised SP6 that he would contact SP6 once he had got the drugs. The discussion of the supply of drug was between SP6 and Ishak only. After the discussion, SP6, SP8 and the 'sumber' left for Gerik. SP6 and SP8 left the 'sumber' in Gerik, and they proceeded to Narcotics Division in IPK Perak.
- G During the journey from Gerik to IPK Perak, SP6 received a phone call from Ishak enquiring whether SP6 could come to Kupang to collect the drugs and SP6 replied that he could do so provided that he was informed earlier. After reaching the Narcotics Division at IPK Perak SP6 informed SP7 about their meeting with ishak.
- H (d) 17 October 2010
On 17 October 2010 at about 1.30pm SP6 phoned Ishak asking him about the supply of ganja which he had earlier promised. Ishak told SP6 that he was then in Sungai Petani and would contact SP6 later.
- I (e) 18 October 2010
On 18 October 2010 at about 6.05pm SP6 contacted Ishak again about the supply of the drugs. Ishak told him that he had yet to get the supply of the drugs and promised that he would contact SP6 if he got the drugs.
- (f) 19 October 2010

On 19 October 2010, SP6 received a phone call from Ishak informing him that he had only obtained 1kg of ganja and requesting SP6 to come and collect from him. SP6 then asked about the supply of 2 or 3kg of ganja which he had earlier promised, Ishak replied that he had only 1kg of ganja for the time being. Ishak asked SP6 to collect 1kg of ganja first and the rest in 2 or 3 days time.

SP6 then enquired about the price, Ishak told him that the price was RM2,600 for 1kg of ganja. SP6 said RM2,600 was expensive and asked for a reduction of the price, ishak refused to reduce the price and said that he would give a cheaper price when SP6 came to collect the supply of ganja in future.

SP6 asked Ishak to deliver the drugs to him at R&R Bintang Hijau, Kupang Gerik Highway on 20 October 2010 at about 9.30pm.

SP6 then informed SP7 about what had transpired and SP7 instructed SP6 to gather all the anggota at Narcotics Division IPK for briefing on 20 October 2010 at 4pm.

(g) 20 October 2010

On 20 October 2010 at about 9.30am SP6 received a phone call from Ishak enquiring whether SP6 could make it on the night in question and SP6 said he would come around 9.30pm SP6 informed SP7 of the phone call he received.

At about 4pm SP7 was conducting a briefing in JSJN IPK Perak. During the briefing SP6 and SP8 were instructed to act as undercovers. They were given the permission to use the Gen.2 WMK 6867 in this operation. SP6 was given RM3,000 'wang tunjuk' by SP7. SP6 was also instructed to scratch his head as a signal to arrest to the arresting team when he had ascertained that the impugned drug was brought and handed over to him by Ishak.

At 5.15pm all the police personnel involved left for Gerik individually. SP6 and SP8 went in Gen.2 WMK 7867. When they reached Gerik, they stopped at one *mamak's* shop Al Salam at about 7pm.

At the *mamak* shop SP7 was conducting another short briefing which was attended by SP6, SP8 and four police personnel from BSJN Gerik and the other personnel from the raiding team. During the briefing SP6 received a phone call from Ishak but he did not answer the call. At about 7.20pm after the briefing, SP6 phoned Ishak telling him that he was in Selat Pagar area and would reach R&R Bintang Hijau at about 9.30pm SP6 reported the matter to SP7.

At about 7.40pm, SP7 and his arresting team left Al Salam Restaurant to R&R Bintang Hijau Kupang Gerik Highway. SP6 and SP8 were told to leave five minutes later. SP6 and SP8 left at about 7.45pm. While on the way to R&R Bintang Hijau and while they reached the border of Kupang SP6 managed to contact ishak and told him that he had almost reached R&R Bintang Hijau and Ishak said he would also be there.

- A** At about 8.30pm, SP6 and SP8 arrived at R&R Bintang Hijau and they parked their Gen.2 in front of a 'gerai' in the R&R Bintang Hijau. They then entered the main 'gerai' and were seated at table No 2. While in the 'gerai' SP6 and SP7 and his arresting team were in the vicinity of the 'gerai'.
- B** At about 8.45pm, SP6 saw Ishak riding a motorcycle JGW 5417 from the direction of Kupang entering the area of R&R. When Ishak passed by the 'gerai' where SP6 and SP8 were seated, SP6 waved at him signaling to him to park his motorcycle near his car. Ishak stopped and parked his motorcycle on the right hand side of Gen.2 WMK 6867 facing Kupang.
- C** Ishak was seen walking to the table where SP6 and SP8 were seated. While reaching the table, Ishak shook hand with SP6 and SP8 and was seated on the left side of SP8 facing SP6. Ishak then ordered his drink. While drinking SP6 enquired about the drug which Ishak promised to deliver. Ishak replied that the drug was in the bag in the carrier of his motorcycle. SP6 said he wanted to look at the drug and placed it in his car. Ishak said 'OK'.
- D** SP6 then went to the motorcycle JGW 5417. He saw a dark colour bag written 'NY' with its zip up inside the carrier of the motorcycle. When he opened up the zip of the bag, he saw a plastic bag written with the words 'Reisha Collection' and inside the plastic bag was a slab of compressed materials suspected to be ganja. SP6 then closed up the bag. He then scratched his head as a signal to the arresting team. At that point of time, he saw the arresting team having arrested Ishak in the 'gerai'.
- E** After the arrest, SP7 and his men brought Ishak to the place where SP6 was. At that place, SP6 had shown SP7 a bag inside the carrier of the motorcycle in the presence of Ishak. SP7 opened the zip of the bag and took out one red plastic bag. Inside the said plastic bag was a slab of compressed dried leaves which was wrapped with transparent plastic paper suspected to be ganja. The accused was identified by SP6 as Ishak in court.
- F**
- G**
- Analysis by the chemist
- H** After the arrest, SP7 took the accused together with the impugned drug to BSJN Gerik where a report was lodged. The impugned drug that is the slab of compressed dried leaves was subsequently sent to the chemist (SP4) for analysis and was confirmed to be cannabis as defined under s 2 of the Dangerous Drugs Act 1952. The net weight of the said cannabis was 881.57g.
- I**

THE BURDEN ON THE PROSECUTION

- [4] Section 180(1) of the CPC provides:

When the case for the prosecution is concluded the court shall consider whether the prosecution has made out a prima facie case against the accused.

A

[5] What then constitutes a prima facie case? The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 323 described 'a prima facie case' in the following terms:

B

A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by the evidence in rebuttal. The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are as stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain in silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the existence of any reasonable doubt in the prosecution's case, which if it exists, cannot lead to the finding of a prima facie case having been made out.

C

D

E

[6] It is clear that the court must subject the prosecution evidence to maximum evaluation to determine whether all the essential ingredients have been proven at the close of the prosecution case. The maximum evaluation requires the court to test, scrutinise and evaluate the prosecution evidence thoroughly from all angles. It is a test of credibility and reliability of the prosecution evidence.

F

THE LAW ON AGENT PROVOCATEURS

[7] It is not disputed that both SP6 and SP8 who are the police agent provocateurs are competent to testify for the prosecution against the accused, and any statement, whether oral or in writing made to SP6 or SP8 as police agent provocateurs whatever his rank by the accused shall be admissible as evidence at his trial (see s 40A Dangerous Drugs Act 1952).

G

H

ISSUES TO BE PROVED

Whether the prosecution had proven that the accused was trafficking in dangerous drugs, to wit 881g of cannabis by delivery

I

[8] The prosecution was relying on s 2 of the Dangerous Drugs Act 1952 to prove that there was a negotiated sale of 881g of cannabis by delivery. Section 2 of the Dangerous Drugs Act 1952 defines trafficking as follows:

A 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

B

[9] Whether there was a negotiated sale of 881g of cannabis by actual delivery is a question of fact. In *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2008] MLJU 285; [2008] 4 CLJ 631 on the issue of delivery, the Court of Appeal had this to say:

C

In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts on an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or

D

he may place it in a vehicle or a room and hand the keys to the same to the buyer, in all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery.

E

[10] The defence has raised a number of issues attacking this element of the offence at the end of the prosecution case.

F

[11] The main ground of the defence was that the prosecution's version of the negotiated sale of 1kg of ganja at the price of RM2,600 by delivery given by SP6 and SP8 as agent provocateurs was full of contradictions which had destroyed the credibility of SP6 and SP8. I shall produce some of the contradictions mentioned by the defence:

G

(a) there is a doubt as to when the meeting between SP7 and SP6 and SP8 took place and when instructions were given to SP6 and SP8 to act as agent provocateurs. According to the evidence adduced through SP6 and SP8 during the trial that SP7 had instructed SP6 and SP8 to act as agent provocateurs during a meeting on 15 October 2010 whereas it is stated in the opening speech of the prosecution case that such meeting and instructions took place on 15 September 2010.

H

The defence therefore submits that such a discrepancy clearly throws doubts as to whether such meeting and instructions took place;

I

- (b) on the issue whether the 'sumber' was involved in any drug activities, the defence points out that SP6 and SP8 were not truthful and were trying to hide something when they denied having knowledge or having been told by Detective Sergeant Gan that the 'sumber' had had any drug records whereas SP7 told the court that he was told by SP6 that the 'sumber' had some drug records. A
The defence submits that the discrepancy between the evidence of SP6 and SP7 has cast doubt on the credibility of SP6 and SP8; B
- (c) the defence raises another discrepancy between the evidence of SP6 and SP8 with regard to the identity of the target. According to SP6, he said during the meeting between SP8, himself and the 'sumber', the 'sumber' told him about the activity carried out by the target and the 'sumber' could introduce SP6 and SP8 to the target whereas SP8 said he heard the 'sumber' telling them about the drug trafficking activity in Kupang and the person selling drug. The 'sumber' did not tell them the identity of the person selling drug and SP8 when asked in cross-examination 'Apa perbincangan yang kamu dengar di antara DSI Busra dengan sumber dalam bilik tersebut?' he said: 'Sumber menyatakan untuk memperkenalkan satu lelaki Melayu dengan DSI Busra (SP6)'; C
D
- (d) the defence further submits that there was a contradiction on the contents of the information received by SP6. According to the defence SP6 told the court that the information received by him was about a male Malay who was carrying out drug trafficking activities in Kampong Kupang Baling whereas SP7 in his cross-examination told the court that the information given by SP6 to him was about a male Malay who was carrying out drug activities in the area of Gerik. The defence submits that the above contradiction clearly shows that there was no communication between these two witnesses regarding the project; E
F
- (e) the defence submits that according to SP6, while at the Siamese Restaurant, he instructed the 'sumber' to phone the accused. The 'sumber' phoned the accused informing him that they had arrived and were in the Restaurant. Whereas SP8 during cross-examination when asked what he heard from the telephone conversation between the 'sumber' and the male Malay, SP8 replied 'Sumber ada mengatakan kepada satu lelaki Melayu itu ada memperkenalkan saya dan DSI Bursa kepada lelaki Melayu tersebut' and SP8 agreed with the defence that was the only conversation between the 'sumber' and the male Malay. The defence submits that such a contradiction will cast doubt on the contents of the conversation; G
H
- (f) the defence submits that there is serious discrepancy between the evidence of SP6 and that of SP8 on the contents of conversation between the accused and SP6. The defence quoted what was said by SP6 in court about the discussion of the supply of drugs by the accused: 'selepas I

A perkenalan beliau ada buat perbincangan dengan Ishak mengenai bekalan ganja dan dalam perbincangan tersebut Ishak sanggup untuk membekalkan kepadanya ganja 2 ke 3 kilogram dan harganya dia akan beritahu kemudian. Menurut SP6 lagi Ishak beritahu beliau dia akan bekalkan ganja tersebut kepadanya dalam masa 2 hingga 3 hari lagi. SP6
B selanjutnya mengatakan bahawa beliau dan Ishak ada menukar nombor telefon bimbit masing-masing. Ishak juga berkata jika bekalan ganja yang dijanjikan ada dalam simpanannya dia akan menghubungi SP6'. After quoting what was said by SP6, the defence also quoted the conversation between SP6 and the accused which was heard by SP8 as follows:

C In examination-in-chief, SP8 said:

'Selepas perkenalan tersebut, antara Ishak dan penyamar sebut No. 1 membincangkan tentang bekalan dadah ganja. Sewaktu perbincangan tersebut, saya tidak tahu apa-apa saya tengok televisyen'.

D In cross-examination, SP8 said:

E 'Dalam tempoh 20–30 minit itu DSI Busra ada menanyakan bekalan ganja pada lelaki Melayu tersebut lalu beliau mengatakan ada tetapi bagi tempoh seminggu untuk mendapatkan bekalan ganja tersebut. DSI Busra bertanya kepada Ishak berapa banyak bekalan ganja boleh diambil. Jadi Ishak menyatakan tak pasti lagi. Sekiranya ada bekalan ganja tersebut Ishak akan menghubungi Abang Mat. Lalu DSI Busra menyatakan baiklah. Sekiranya ada lebih bekalan ganja, Ishak beritahu kepada Abang Mat, Ishak menyatakan 'OK' DSI Busra mengatakan pada Ishak kalau boleh,
F beritahu kepadanya lebih awal. Apa yang saya dengar itu saja'.

The defence has pointed out that there is a discrepancy on the amount of ganja the accused said he could supply and the time he could supply;

G (g) the defence further submits that according to SP6 Ishak told him that he could supply 2–3kg of ganja in 2 or 3 days times but SP7 told the court that SP6 told him that Ishak had agreed to supply 1kg of ganja in a few days time;

H (h) the defence refers the court to the opening speech (P3) which states in para 8 that during the meeting at the Siamese restaurant, the accused had agreed to deliver the drugs at R&R Bintang Hijau Highway Gerik Kupang whereas according to SP6 the place of delivery was not mentioned in the discussion in the Siamese restaurant;

I (i) The defence also submits that SP6 is not a credible witness as he did not report all the discussions with the accused over the telephone from 15–19 October 2010 to his superior officer SP7. His evidence that the accused told him that the price per kilo of ganja was RM2,600 has contradicted with that given by SP7 that SP7 was informed by SP6 that the price per kilo of ganja was RM2,300;

- (j) the defence also raised another discrepancy between the evidence of SP6 and that of SP7. The defence alleged that according to SP6, when SP6 saw the accused coming on his motorcycle while they were in the 'gerai' in R&R, he waved to the accused so that he would park his motorcycle besides his car whereas according to SP7, he said he saw SP6 waving to the accused meaning asking the accused to come to the 'gerai'. The defence submits that waving to the accused to park his motorcycle besides SP6's car and waving his hand asking the accused to come to the 'gerai' is a contradiction; A
- (k) the defence also points out that there are three versions as to the contents of conversation that took place in the 'gerai' in R&R Bintang Hijau between SP6 and the accused. B
- The defence submits that 'Dalam keterangan SP6 mengatakan hahawa selepas OKT memesan minuman beliau ada bertanya kepada Ishak 'barang adakah' dan Ishak beritahunya ada dalam begnya di raga motorsikal. Kemudian beliau beritahu OKT beliau nak tengok dan ambil dan bawa masuk ke dalam keretanya dan selepas itu beliau akan datang balik ke dalam gerai dan bayar duit. Menurutnya lagi Ishak beritahunya 'OK'. C
- Keterangan ini bercanggah sama sekali dengan Ucapan Pembukaan (P3) yang berbunyi 'Di meja tersebut DSI bertanya kepada tertuduh 'barang ada ke?' Jawab tertuduh 'ada', 'dalam beg hitam dalam raga motorsikal saya'. DSI Busra seterusnya minta pada tertuduh untuk tengok sebelum datang semula untuk buat bayaran. Tertuduh kata 'ok' 'beg saya zip' 'abang buka tengok'. D
- Manakala apabila SP8 memberi keterangan dan ditanya apa yang beliau dengar soal jawab antara SP6 dan OKT, beliau berkata, 'DSI Busra ada tanya 'bekalan ganja ada ke?' Ishak kata 'ada' di dalam raga motorsikalnya. Itu saja saya dengar dan selepas soal jawab ini DSI Busra terus ke motorsikal Ishak. Beliau bersetuju tiada perbualan lain antara Ishak dan SP6'. E
- F
- G

FINDINGS BY THE COURT

[12] After carefully considered the evidence adduced by SP6, SP7 and SP8 I am satisfied that the alleged discrepancies raised by the defence in its submission at the end of the prosecution case are not sufficient to destroy their credibility for the following reasons: H

- (a) the discrepancies are minor; I
- (b) some discrepancies would be expected of witnesses giving their recollections of a series of events that took place some time ago: see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; and

- A (c) two or more persons witnessing the same incident may give varying, yet truthful, accounts of it according to their perception: see *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14.

B [13] On the issue of the discrepancy between evidence adduced in court and what is stated in the opening speech, since the Superior Courts in *Thien Teck Soon v Public Prosecutor* [2011] 3 MLJ 438; [2011] 3 CLJ 632 and *Timhar Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775; [2010] 3 CLJ 938 have clearly ruled that opening speech is not evidence and the prosecution is not bound by what has been stated therein, in cases where there is some discrepancy between the evidence adduced in court and what is stated in the opening speech, I am of the considered view that the court should rely on the evidence adduced in court as it is given upon oath and is tested in cross-examination.

D [14] Having examined, tested, scrutinised and evaluated the evidence of SP6, SP7 and SP8 from all angles, I find that apart from some minor discrepancies they are consistent in their testimonies and their testimonies are not shaken at all and have established the following events:

- E (a) the first discussion on the supply of drugs by the accused to SP6 took place on 15 October 2010 in a Siamese restaurant by the road side of the Jalan Besar Kupang Baling. During the discussion, the accused told SP6 that he could supply 2–3kg of ganja in 2–3 days time and would inform SP6 of the price later. They then exchanged phone numbers. The accused
- F told SP6 that he would contact SP6 if he had got the drugs in his hand;

- (b) on 19 October 2010 at about 9.15pm the accused contacted SP6 informing him that he had had with him 1kg of ganja and asked SP6 to collect from him as soon as he could. The accused also told SP6 that he promised to supply the rest in 2 or 3 days time.

G As regards the supply of 1kg of ganja, there was some bargaining over the price RM2,600 per kilogram between SP6 and the accused. As the accused refused to reduce the price, it was agreed that the price of 1kg remained at RM2,600. It was also agreed between SP6 and the accused that SP6 would want to collect the drugs at R&R Bintang Hijau Kupang Gerik Highway on 20 October 2010 at about 9.30pm and the accused would deliver the said 1kg of ganja to the said R&R Bintang Hijau; and

- H (c) the delivery of the drug.
- I On 20 October 2010 at about 8.30pm SP6 and SP8 arrived at R&R Bintang Hijau and waited in a ‘gerai’ for the delivery of the drug as promised by the accused.

On the night in question at about 8.45pm, the accused was seen arriving at R&R Bintang Hijau in his motorcycle JGW 5417. The accused, after parking his motorcycle beside the Gen.2, came to the table where SP6

and SP8 were seated. When asked by SP6 where the drug was, the accused told SP6 that the drug was in his motorcycle JGW 5417. SP6 went to the said motorcycle and found that a slab of compressed dried material placed in a plastic bag inside a bag which was placed in the carrier of the motorcycle. SP6 gave signal by scratching his head and the accused was arrested.

A

B

[15] Other defences raised during the prosecution stage:

- (a) the defence which was attempted to be put forward by the accused during the prosecution case was that during the meeting with the 'sumber' and the accused on 15 October 2010 the accused told SP6 that he had a friend by the name of Nagan who was involved in drug activities. SP6 persuaded the accused to assist the police and promised the accused that he would be given cash as a reward and SP6 would be playing the role of an uncover as a purchaser. The accused agreed. SP6 told the accused to contact him when he had transacted with Nagan. The accused had subsequently informed SP6 that he would contact SP6 when Nagan had obtained the supply of drug. On 19 October 2010 the accused phoned SP6 informing him that Nagan had already obtained the supply of 1kg of drug and he asked for the price of RM2,600. SP6 told the accused to inform Nagan that the date and place of delivery of the said drug was on 20 October 2010 at night in R&R Bintang Hijau. The accused subsequently told SP6 that Nagan had agreed to deliver the drugs in R&R Bintang Hijau on 20 October 2010 between 8pm and 9pm. On 20 October 2010 Nagan and the accused arrived at R&R Bintang Hijau and were having a drink in the main 'gerai'. When SP6 and SP8 arrived in their car, Nagan left the accused. When SP6 and SP8 came to the 'gerai' the accused told SP6 that Nagan was somewhere near where his motorcycle and SP6's car were. The accused then asked SP6 to see Nagan to negotiate with him. SP6 then walked towards the direction of the motorcycle while SP8 and the accused stayed back in the 'gerai'. Before SP6 reached the motorcycle, Nagan sped off with his motorcycle. SP6 did not manage to arrest Nagan and the drugs found belonged to Nagan.

C

D

E

F

G

Having considered the defence attempted to be put forward by the accused at the end of the prosecution case, I find that it is highly unbelievable and had failed to cast any reasonable doubt in the prosecution case for the following reasons:

H

- (i) the entire defence was categorically denied by both SP6 and SP8 as they told the court that the name 'Nagan' was the first time they heard in court. I do not see any reason not to believe them as their testimonies are consistent and are not at all shaken by the defence; and
- (ii) if it is true that the accused had agreed to help the police to nab

I

- A Nagan for a reward, it is highly unreasonable for the police to charge the accused when they failed to arrest Nagan. The police would ruin their reputation if they were to charge someone who promised to help them to nab the drug trafficker when the drug trafficker had absconded.
- B (b) the defence also questioned why was SP2 a police photographer was asked to conduct finger print dusting on the drugs found before it was handed over to SP9 the IO. The defence submits that two inferences can be drawn, that is, one is either SP7 knew that the drug was brought by
- C person other than the accused to the scene or SP7 intended to erase finger print from the drug;
- (c) the defence also submits that the accused was arrested at 9pm and according to SP2, SP7 instructed him to conduct finger print dusting on
- D the exhibit on 20 October 2010 at about 8.50pm. The question arises here is that: How could the finger print dusting on the exhibit was done before the accused was arrested?;
- (d) the defence also points out that there was also a doubt as to when the
- E finger print dusting was done. According to SP7 it was done at 9.30pm whereas SP9 said the finger print dusting was done at 10pm in his presence.
- I find that the above submissions are without merits. Firstly, there is nothing wrong for SP7 to instruct SP2 a photographer to do finger print dusting on the exhibit before handing over the exhibit to the IO ('SP9').
- F It is baseless for the defence to allege that SP7 intended to erase the fingerprint from the exhibit in the absence of any evidence to the contrary.
- Secondly, SP7 has clarified that he had instructed SP2 to do the fingerprint dusting on the exhibit on 20 October 2010 at about 9.30pm.
- G As regards the time the fingerprint dusting was conducted, there is only a difference of 30 minutes between the time given by SP2 and SP9. I think such a difference is small and is acceptable due to the estimation of time given by different witnesses; and
- H (e) the defence also submits that SP9 the IO in this case had not carried out a thorough investigation. It has been adduced during cross-examination that while recording a statement from the accused, the name Nagan did surface. When SP9 was cross-examined by the defence counsel the following question:
- I 'Memandangkan KT ditangkap di dalam kedai manakala dadah dijumpai dekat motorsikal dan dalam siasatan kamu telah timbul perkara bahawa Nagan berada berdekatan motorsikal, ia adalah penting untuk membuat siasatan lanjut' SP9 answered 'setuju'.

The defence submits that since in this case no investigation was carried out by SP9, an inference in favour of the accused ought to have been drawn at the close of the prosecution case: see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Public Prosecutor v Lim Ah Bek* [1989] 2 CLJ 1090.

Having perused the evidence adduced in the case at the end of the prosecution case, I find that the facts of this case are different from the two cases cited by the defence. In the case before us, it has been established by the prosecution that it was the accused who had negotiated for the sale of one kilogram of ganja at the price of RM2,600 to SP6. It was also the accused who had delivered the impugned drug to the appointed place on the appointed day and time. The impugned drug delivered was found in the carrier of the accused's motorcycle. The issue whether another person by the name of Nagan who was near the accused's motorcycle who had sped off in his motorcycle when SP6 was walking towards the accused's motorcycle will not affect the prosecution case at all. Taken that IO did not investigate Nagan I do not think that the omission by the IO to investigate Nagan is fatal to the prosecution case.

The issue whether there was any break in the chain of evidence in relation to the exhibit seized

[16] It has been established by the prosecution that on 20 October 2010 after the exhibits were seized by SP7 at the scene and they were brought back to JSJN Gerik by SP7 himself.

[17] At JSJN, he instructed SP2 to do fingerprint dusting on the exhibit at 9.30pm in the presence of IO SP9 and himself. After that SP7 lodged a police report and this was followed by the marking of the exhibits and the issuance of the search list. After everything was done, he handed all the exhibits to the IO SP9 in JSJN Gerik.

[18] After receiving the exhibits SP9 weighed the drugs. After that he kept all the exhibits except the motorcycle in his cabinet under lock and key in his office.

[19] On 21 October 2010 after coming back from the scene of incident SP9 instructed SP2 to take photographs of the exhibits in his narcotics office in IPD Gerik. When the photographs were taken, all the exhibits were under his supervision. After the photographs sessions, SP9 sent all the exhibits to the exhibit store. On 25 October 2010 about 3.30pm, except the motorcycle all the exhibits were taken out from the exhibit store by Sergeant Mazlan under the

A supervision of SP9 for press conference. During the press conference in the conference room IPD Gerik from 5.30pm to 6.30pm the exhibits were arranged by Sergeant Mazlan under the supervision of SP9.

B [20] After the press conference SP9 instructed Sergeant Mazlan to keep the exhibits back to the exhibit store.

C [21] On 26 October 2010 at about 9am SP9 took out one slab of compressed dried leaves wrapped in plastic paper marked F2 from the exhibit store. He then put the slab into a box. He sealed it and marked it 'I'. He then sent the box to the chemist Cik Nurul Fatlina bt Harun, in the Chemist Department in Ipoh for analysis. He was given an acknowledgement slip.

D [22] On 26 January 2011 about 10am he went to the Chemist Department to collect back the exhibits after analysis and a chemist report.

E [23] On the same day at 8.30pm SP9 handed the exhibits to Sergeant Mazlan to be kept in the exhibit store. When the box marked 'I' (exh P9) was produced in court before SP4 the chemist, she told the court that the box together with the seal were in good condition. The contents of P9 that is P9A, P9B and P9C were identified by the chemist SP4.

F [24] The defence submits that SP9 after receiving all the exhibits had kept the exhibits (except the motorcycle) in the cabinet under lock and key — SP9 did not in his evidence say that when he took the exhibits out for photograph sessions and SP2 the photographer also did not confirm that he saw SP9 taking the exhibit out for the photographs to be taken.

G [25] The defence therefore submits that the chain of evidence of the exhibit is broken.

[26] I find that the submission by the defence on the break of the chain of evidence of the drug seized is totally without merit.

H [27] I am satisfied that there is no break in the chain of evidence of the drug seized from the day the drug was seized by SP7 until it was tendered in court. As a general rule where there is no doubt as to the identity of the drugs seized, it is therefore not necessary for the prosecution to call every single person who had handled the drug for testify in court. In this case the prosecution did call
I those who have handled the drugs to testify in court.

[28] I therefore find that the prosecution has satisfied the court that there was no break in the chain of evidence of the drug seized.

A

FINDINGS BY THE COURT AT THE END OF THE PROSECUTION CASE

B

[29] Having carefully considered the evidence adduced at the end of the prosecution case, I am satisfied that the prosecution had established a prime facie case on the offence of trafficking by delivery under s 39B(1)(a) of the DDA and there is no break in the chain of evidence in respect of the drug seized.

C

[30] I therefore call the accused to enter his defence.

THE DEFENCE

D

[31] Three alternatives had been explained, the accused chose to give a statement from the dock.

[32] A written statement tendered by learned counsel for the defence has been read to and signed by the accused and was marked as D26.

E

[33] His statement from the dock reads:

Saya berumur 31 tahun pada masa kini dan telah berkahwin. Saya tinggal bersama dengan keluarga saya iaitu Kampung Pak Bong 09200, Kubong, Kedah.

F

Saya mengenali seorang rakan saya (sumber) yang adalah seorang penagih dadah. Setahu saya sumber pernah ditangkap oleh polis dari Gerik Perak atas kesalahan dadah. Sumber ada membeli dadah dari kenalan saya iaitu Nagan. Sumber dan Nagan tidak kenal antara satu sama lain kecuali melalui saya di mana sumber ada membeli ganja daripada Nagan sejumlah RM10.00 sebelum 15/10/2010. Itu adalah kali pertama sumber berjumpa dengan Nagan.

G

Pada 15/10/2010 sebelah lewat petang saya telah dihubungi oleh sumber bahawa beliau ingin berjumpa dengan saya pada hari tersebut bersama dengan 2 orang kawannya. Saya telah memberitahu sumber untuk datang ke kampong saya di Baling, Kedah. Sumber bersetuju dan saya suruh beliau untuk hubungi saya apabila sampai di Kampung Kupang, Baling, Kedah.

H

Pada malam tersebut sumber telah telefon saya dan memberitahu bahawa beliau telah sampai di Restoran Makanan Siam, Jalan Besar, Kupang, Baling. Kemudian saya pergi ke sana dan berjumpa dengan sumber serta kawannya yang dikenali sebagai Abang Man dan Jai.

I

Semasa di restoran tersebut sumber telah memberitahu bahawa Abang Man dan Jai ingin membeli dadah jenis ganja. Saya telah memberitahu mereka bahawa saya tidak berurusan dengan sebarang kegiatan dadah tetapi kawan saya yang bernama Nagan.

- A** Perkara ini memang diketahui oleh sumber. Kemudian Abang Man dan sumber telah minta saya menghubungi Nagan untuk buat urusan tersebut tetapi saya maklumkan bahawa Nagan tidak ada telefon bimbit untuk dihubungi.
- B** Pada masa itu sumber dan Abang Man telah meminta saya untuk membantu untuk buat urusan dengan Nagan agar dadah dibekalkan kepada Abang Man. Pada mulanya saya enggan tetapi setelah dipujuk dan dirayu oleh sumber dan Abang Man dan dimaklumkan bahawa Abang Man dan Jai adalah pegawai polis dan untuk menyakinkan saya telah menunjukkan kad kuasa oleh Abang Man, saya pun bersetuju untuk membantu mereka tetapi tidak ingin melibatkan diri. Saya bersetuju atas arahan Abang Man dan sumber akan bantu saya dalam urusan itu dan Abang Man akan bertindak sebagai penyamar untuk membeli serta berjanji untuk memberi wang tunai sebagai ganjaran kepada saya jika urusan ini berjaya kerana memberi bantuan kepada pegawai polis telah menggalakkan saya untuk membantu mereka.
- C**
- D** Abang Man telah memberitahu saya agar memberitahu Nagan bahawa Abang Man ingin membeli 1 kilogram ganja dan tanya harga ganja dan beritahu Abang Man. Saya telah diarahkan oleh Abang Man supaya menghubungi Abang Man setelah berurusan dengan Nagan. Abang Man dan saya telah bertukar nombor telefon antara satu sama lain. Kemudian kami beredar dari situ.
- E** Pada 17/10/2010 Abang Man ada telefon saya untuk bertanyakan perkembangan urusan saya dengan Nagan dan saya telah memberitahu Abang Man saya masih belum jumpa Nagan.
- F** Pada 18/10/2010 Abang Man ada menelefon saya dan saya telah beritahu bahawa Nagan sedang usahakan untuk mendapatkan dadah dan saya akan hubungi Abang Man setelah Nagan mendapat bekalan dadah yang diminta.
- G** Pada 19/10/2010 saya telah hubungi Abang Man dan maklumkan bahawa Nagan telah mendapat bekalan ganja 1 kilogram dan meminta wang sebanyak RM2,600.00. Semasa itu Abang Man telah meminta saya bincang dengan Nagan tempat penyerahan dadah dan mahu saya pastikan Nagan datang semasa penyerahan dadah tersebut. Abang Man juga cadangkan supaya beritahu Nagan bahawa tempat sesuai ialah Restoran R & R Bintang Hijau pada waktu malam hari keesokannya iaitu 20/10/2010. Setelah saya berbincang, Nagan bersetuju dengan cadangan tersebut dan memberitahu supaya berurusan antara jam 8.00–9.00 malam.
- H** Pada 20/10/2010 saya dan Nagan telah menaiki motorsikal masing-masing dan telah sampai di Restoran R & R Bintang Hijau pada pukul 8.00 malam, saya telah meletakkan motorsikal saya di hadapan restoran tersebut tetapi Nagan telah meletakkan motorsikal di bahagian tepi restoran itu yang berkeadaan gelap. Semasa masuk: dalam restoran itu saya lihat ada seorang lelaki yang saya biasa panggil 'Abang' yang tinggal berdekatan dengan kampong saya. Saya menuju ke arah beliau untuk memberi salam dan kemudian duduk dengan Nagan di meja lain. Kami pesan minuman dan menunggu Abang Man datang. Tidak lama kemudian saya nampak Abang Man datang dengan Jai menaiki kereta Gen-2 dan beliau meletakkan keretanya bersebelahan dengan motorsikal saya. Pada masa itu Nagan telah memberitahu saya bahawa beliau ingin pergi ke tempat motorsikalnya dan akan bawa motorsikal dan ganja, supaya pembeli boleh meletakkan ganja tersebut dalam keretanya.
- I**

Apabila Abang Man dan Jai datang mereka duduk di meja saya dan bersembang serta memesan minuman. Saya telah beritahu Abang Man bahawa Nagan keluar sekejap dan tunggu dia kembali. Abang Man tanya sama ada bekalan ganja ada atau tidak, saya kata ada bersama dengan Nagan. Tidak berapa lama Nagan menunggang motorsikalnya dan datang bersebelahan dengan kereta dan motorsikal saya. Saya terus memberitahu Abang Man bahawa itu adalah Nagan dan meminta Abang Man pergi dekat Nagan dan berbincang.

A

B

Abang Man terus bangun dan berjalan ke arah Nagan sementara saya dan Jai berada dalam restoran tersebut. Saya amat terkejut apabila melihat tiba-tiba Nagan memecut dengan motorsikalnya sebelum Abang Man sempat mendekatinya dalam jarak 5 kaki. Saya juga lihat Abang Man dan beberapa orang yang tidak kelihatan sebelum ini mengejar motorsikal Nagan tetapi tidak Berjaya.

C

Kemudian saya lihat Abang Man menuju ke motorsikal saya dan keretanya dan mencapai satu beg yang di dalamnya ada dadah ganja. Beg ini berada dalam motorsikal Nagan semasa Nagan dan saya sampai di restoran tersebut. Pada masa yang sama ada beberapa orang datang ke meja saya dan menangkap saya. Pada masa itu Jai masih berada di situ.

D

Saya memang ada meronta-ronta semasa saya ditangkap kerana saya ditangkap walaupun saya tidak terlibat tetapi membantu Abang Man untuk menangkap Nagan yang adalah pengedar dadah ganja yang sebenar dan telah dimaklumkan oleh Abang Man pada awalnya. Saya percaya saya telah dianayai kerana Abang Man gagal untuk tangkap Nagan.

E

Saya adalah maklumkan berkenaan dengan Nagan kepada polis dalam siasatan dan pihak polis ada tanya saya alamat Nagan tetapi tidak tahu alamat penuh tetapi tidak membawa saya untuk mencari Nagan di rumahnya yang saya mempunyai pengetahuan.

F

[34] After giving his statement from the dock, the accused called Abdul Jabir bin Salleh ('SD1') as his only defence witness. Briefly this is what SD2 said in evidence.

G

[35] SD1 told the court that he knew the accused and he also knew how the accused was arrested.

[36] He said on 20 October 2010 he reached R&R Bintang Hijau at about 8pm. He was seated in the shop for about five minutes then came the accused. Then he saw a person coming from his back and went to the table where Ishak was seated.

H

[37] At the same time he also saw a WAJA parked by the side of the road near the shop. SD1 then saw four persons alighting from the WAJA and entering the shop and seated at a table beside Ishak's table.

I

- A [38] About 20–30 minutes later came one Gen.2 and stopped besides the accused's motorcycle. SD2 saw two persons coming down from the car walking towards the direction of the accused. When the two persons arrived, the person who came from his back and seated with Ishak left the place. About 2 or 3 minutes later SD2 saw a motorcycle coming from his back and heading towards where the accused's motorcycle and the Gen.2 were.
- B

- [39] At the same time SD2 saw a person among the persons seated at the accused's table standing up and going to the motorcycle which he saw earlier. At the same time, 2 or 3 persons also went towards the motorcycle. The motorcyclist then sped off.
- C

[40] SD2 then said he saw the accused was arrested and was brought into the WAJA.

- D [41] But during the cross-examination, SD2 said that the two male persons who came in Gen.2 came to the shop first before the accused arrived. However in re-examination, SD2 corrected himself by saying that it was the accused who arrived earlier than the two male persons.

- E EVALUATION OF THE DEFENCE AND FINDINGS BY THE COURT

- [42] It is trite law that the accused has the right to elect to give an unsworn statement from the dock. Bearing in mind that the statement from the dock is an unsworn statement which is not tested in cross-examination, I have considered such a defence raised through the unsworn statement of the accused and the sworn testimony of SD2 and find that it was similar to the defence suggested during the prosecution case that is, the accused was not involved in the trafficking of 1kg of ganja as alleged by the prosecution but instead, the accused had agreed to help the police (SP6) for a reward to nab one Nagan who had agreed to supply 1kg of ganja to SP6 at the price of RM2,600. When Nagan managed to abscond on the night in question, the police had arrested the accused and charged him for this drug trafficking offence.
- F
- G

- H [43] Having considered the evidence adduced by the defence vis-a-vis the evidence adduced by the prosecution in totality, I find that it is unbelievable and unacceptable because it is a bare denial which is in complete contradiction to the version given by the two prosecution agent provocateurs. The alleged defence when raised during the prosecution stage had been categorically denied by SP6 and SP8. SP6 and SP8 were very firm that the person whom they were discussing about the sale and purchase of the drugs was the accused. They were certain that the accused was the person who promised to supply one kilogram of ganja at the price of RM2,600. They were also certain that on the fateful night it was the accused and no one else who had delivered the drug to the
- I

appointed place and the name 'Nagan' was the first time they heard in court. I find that they are witnesses of truth. I have no reason not to believe them when they had testified upon oath and their evidence was subject to rigorous cross examination and was not shaken at all in their evidence. On the other hand, I do not inclined to give much weight to the unsworn statement of the accused as it has not been tested in cross-examination having evaluated it against the sworn evidence of SP6 and SP8. As regards the evidence of SD1, I find that it is not safe to rely on the evidence of SD1 for the following reasons: first, SD1 was not sure of what he said in court on a very material fact that is whether who came to R&R Bintang Hijau first, the accused or the two male Malays. During cross-examination, he agreed with the prosecution that the two male Malays came first before the accused arrived. However in re-examination he corrected himself again by saying that it was the accused who came to R&R first before the two male Malays came. Even if the court were to accept the evidence given by SD1, that only goes to show that on the night in question there was a third person who sped off with his motorcycle when SP6 went towards the accused's motorcycle. I find that this piece evidence given by SD1 would not shake the testimonies of SP6 and SP8 in respect of the negotiation of the sale and purchase of drug between SP6 and the accused and the delivery of the impugned drug by the accused at the appointed time and place. Secondly SD1 is a friend of SD1 and lastly, it was never put to the SP6, SP7 or SP8 that SD1 was in the 'gerai' on the night in question.

[44] I find that the unsworn statement of the accused together with the testimony of SD1 failed to create any reasonable doubt in the prosecution case.

[45] For the above reasons, I find that the prosecution has proved its case beyond reasonable doubt against the accused for the trafficking offence as per charge at the end of the defence case.

DECISION

[46] I therefore found the accused guilty and sentenced him to be hanged by the neck until death.

A *Accused found guilty as charged and sentenced to death.*

Reported by Kohila Nesan

B

C

D

E

F

G

H

I